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In the Supreme Court of the United States

OCTOBER TERM, 1985

JIMMY C. ROSE, WARDEN, PETITIONER

v.

STANLEY BARHAM CLARK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether jury instructions creating a rebuttable presumption that the defendant killed with malice aforethought were harmless where (a) the evidence conclusively proved that the defendant killed both victims with malice aforethought, (b) the jury found that he also killed one victim willfully and with premeditation and deliberation on an intent to kill, and (c) the defenses he asserted—nonparticipation, insanity, amnesia, and voluntary intoxication—could not have been affected by the jury instructions on malice.

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INTEREST OF THE UNITED STATES

The question presented by this case is whether jury instructions creating a rebuttable presumption that the defendant killed with malice aforethought were harmless. The Court's resolution of this question will apply equally to state and federal prosecutions involving this and other types of errors that might be claimed to be reversible even in the absence of actual prejudice to the defense.

STATEMENT

1. a. On December 30, 1978, Joy Faulk and Charles Browning were shot to death by respondent Stanley Clark while they were sitting in Browning's pickup truck in a

remote area of Rutherford County, Tennessee. The killings stemmed from "a somewhat complicated domestic situation" (Pet. App. A24). Following her divorce from her husband Sam Faulk, Joy Faulk had a "stormy" relationship with respondent (*ibid.*). After they separated, Faulk became involved with Charles Browning. Respondent was angered by that relationship and threatened to kill Faulk if he learned that she was dating another man (*ibid.*; 3 Tr. 390-392, 395, 397, 422-423, 438-439; 4 Tr. 461-462, 508, 512).

On the night of December 30, Joy Faulk, Charles Browning, and Joy's two children were driving in Browning's truck in a remote area of the county. Respondent pursued them in his truck, and, when Browning pulled into a driveway to let respondent pass, respondent stopped his truck behind Browning's, blocking any escape. After moving to virtually point-blank range of both victims, respondent, using a pistol that he had borrowed from a friend, shot Faulk three times, twice in the head and once in the left rear shoulder, and shot Browning once in the head. Pet. App. A2-A3, A8-A10, A24-A25.

b. Respondent did not testify at trial. His chief defense, presented through cross-examination of the State's witnesses, was that Sam Faulk, Joy's Faulk's ex-husband, had murdered Joy Faulk and Browning. Sam Faulk's motive, respondent argued, was retaliation for a child custody suit that Joy Faulk had filed against him, which stemmed from an incident in which he was alleged to have molested his daughter Mitzi (Pet. App. A24-A25, A32-A33; 1 Tr. 18-23; 2 Tr. 234-235; 4 Tr. 464-466; 5 Tr. 670-671, 686-689; see generally 8 Tr. 1009-1051 (defense closing argument)).[1] Respondent also presented evidence

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[1] That defense was based upon a rumor at large in the county (4 Tr. 464-466). In truth, however, Mitzi simply had a urinary tract infection (3 Tr. 458-459). Moreover, several eyewitnesses testified for the State that Sam Faulk had spent the entire evening at a local bar and was there at the time that Joy Faulk and Browning

in support of three other partially inconsistent defenses: insanity, amnesia, and voluntary intoxication (Pet. App. A5, A17-A20, A39). The evidence of these defenses was introduced chiefly through the testimony of two defense psychiatrists, although respondent also elicited testimony to support these claims on cross-examination of prosecution witnesses (*id.* at A17-A19, A39; J.A. 141; 7 Tr. 879-887).[2]

c. At the close of trial, the trial judge charged the jury that all homicides are presumed to be malicious in the absence of evidence rebutting the presumption (J.A. 185, 187; 8 Tr. 1084-1087) and that the use of a deadly weapon in a manner likely to cause death also gives rise to a presumption of malice (J.A. 187-188; 8 Tr. 1087-1089).[3] The jury was also instructed that (i) insanity was a complete defense to any of the charges, but the jury should consider this defense only if it first found all of the elements of the charged offenses to have been proven (J.A. 190; 8 Tr. 1091-1092); (ii) alibi was a complete defense to all of the charges (8 Tr. 1095-1096); (iii) voluntary intoxication may negate the State's proof of willfulness, premeditation, and deliberation and therefore was a defense to first degree murder, but voluntary intoxication was not a defense to second degree murder or any other lesser included offense (J.A. 193-195; 8 Tr. 1097-1098); (iv) amnesia by itself was not a defense to any of the charges (J.A. 195; 8 Tr. 1098). Respondent was convicted of first degree murder in the killing of

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were killed. See 4 Tr. 482, 582-584; 5 Tr. 594, 638-639, 642-644, 645-646, 654-657, 713-716.

[2] The only other defense witness was the police radio dispatcher who received a telephone call on the night in question informing him that there had been a shooting. 7 Tr. 888-901.

[3] Respondent did not object to the instructions on malice at trial. Pet. App. A10 n.6; see R. 106-120 (proposed defense jury instructions); 8 Tr. 1104 (defense objections to trial court's jury charge).

Faulk and second degree murder with respect to Browning.

2. On appeal, respondent argued that the jury instructions on malice were invalid under *Sandstrom* v. *Montana*, 442 U.S. 510 (1979). The Tennessee Court of Criminal Appeals rejected respondent's argument on the ground that the instructions, read as a whole, did not shift the burden of proof to him on this element of the offense (Pet. App. A37-A39). The court also held that the jury charges did not require reversal because respondent's defenses of nonparticipation and insanity raised no issue regarding whether the killings were done with malice and therefore were not affected by the instructions (*id.* at A39). The Tennessee Supreme Court thereafter denied respondent's application for leave to appeal (*id.* at A40).

3. Respondent later filed a petition for a writ of habeas corpus, raising this claim and others. The district court held that the instructions created a rebuttable presumption of malice and were therefore invalid under *Sandstrom* (Pet. App. A10-A15). The court also held that the error in giving these instructions was not harmless because respondent's defense at trial, in part, was that he lacked an intent to kill because of intoxication at the time of the offense, amnesia, and mental illness, and these defenses were supported by some evidence (*id.* at A15-A20). The court did not inquire, however, whether and how the jury was instructed on these defenses or whether they were valid state-law defenses to malice.

4. The court of appeals affirmed (Pet. App. A1-A6). It agreed with the district court that the jury instructions in this case were erroneous (*id.* at A3-A4), and, while it noted that such errors can be harmless (*id.* at A4-A6), it found that the instructions in this case were prejudicial, because part of petitioner's defense was that he lacked the requisite mens rea for murder (*id.* at A6).

SUMMARY OF ARGUMENT

A. It is axiomatic that appellate courts must ordinarily disregard errors occurring at trial that could not have had a material affect on the verdict. The few exceptions to the harmless error principle involve either violations so basic that they deprive the defendant of the essentials of a trial (such as denial of counsel or lack of an impartial fact-finder) or errors that are both likely to be prejudicial and so difficult to assess specifically that no reliable harmless error inquiry is practical. While at bottom the fault in erroneous presumption instructions is that they impact on the defendant's right to have his guilt determined by the jury, the instructions cannot rationally be deemed the functional equivalent of a denial of a jury trial. Beyond that, the instructions on malice given here were used in countless numbers of criminal trials since the early common law and thus cannot be deemed so inherently subversive of due process that their use amounts to the denial of any trial at all.

It also cannot be said that an erroneous instruction on a presumption will so invariably prejudice the accused in undetectable ways that undertaking a case-by-case inquiry into their prejudicial effect is futile. *United States* v. *Frady*, 456 U.S. 152 (1982), held that similar jury instructions were not prejudicial in every case in which they are used and that a court can look to the evidence adduced at trial, the defenses (if any) asserted by the accused, and the jury's findings as revealed by its verdict in order to determine whether the instruction was prejudicial. The lower courts have also generally held that a case-by-case determination of prejudice due to an erroneous presumption instruction is feasible.

B. The record shows that respondent was not prejudiced by the instructions on malice. The nature of the crime itself—multiple gun shots to the head at point blank range—virtually forecloses any conclusion that malice was absent. Moreover, the jury found that respondent murdered one of his victims willfully and with premeditation and deliberation on an intent to kill. It

is inconceivable that any jury that made those findings would not also have found under proper instructions that respondent killed with malice. Finally, the court's instructions on malice were irrelevant to respondent's defenses at trial. Respondent's alibi defense did not call into question the degree of culpability, but instead involved a total denial of participation. The jury was told not to consider his insanity claim unless and until the jury found that he was guilty of the charged offenses. Finally, neither amnesia nor intoxication would negate malice under the jury instructions given at respondent's trial or under Tennessee law. This case is controlled by *Frady*, in which the Court found that the defendant was not prejudiced by similar instructions on malice.

ARGUMENT

THE ERRONEOUS JURY INSTRUCTIONS IN THIS CASE DO NOT JUSTIFY SETTING ASIDE RESPONDENT'S CONVICTIONS

A. There Are Few Kinds Of Trial Error That Automatically Invalidate A Conviction Regardless Of The Likelihood Of Prejudice In The Circumstances Of The Particular Case

1. The trial of a criminal case can be an extremely complex undertaking. The examination of prospective jurors must be sufficiently comprehensive to allow the parties an opportunity to discover bias, but not so prolonged as to delay the start of trial for an undue period. Every question asked of a witness and every document offered into evidence could potentially raise issues implicating principles of evidence that took Dean Wigmore ten volumes to explain. The comments by the trial judge on the evidence must not prejudice the jury against the accused. The extemporaneous arguments of counsel may mistakenly offend principles that would have been respected if counsel had had greater time to research and prepare. The trial court's charge to the jury, even when

aided by standardized jury instructions, must draw upon the legal rules laid down in scores of decisions by this Court and others. At any stage during a trial—particularly a jury trial—errors may be made. And the likelihood of an error occurring increases as new decisions from this Court and others establish different rules for the trial courts to implement or refine already-established principles.[4]

Correcting every error that occurs before or during a criminal trial by ordering a new trial is also a costly balm.[5] New trials consume scarce judicial resources and introduce additional delays into the administration of justice for all participants. If a trial judge compensates by taking on an increased case load, that may require a sacrifice of legal study and thereby increase the risk of mistake in every case that the judge tries. New trials are equally costly to the prosecutor: the trials of other defendants may have to be postponed or foregone altogether, or the prosecutor may be forced to agree to plea bargains that would be unacceptable were adequate resources available for trial. Witnesses are compelled to relive painful, and sometimes harrowing, experiences, thereby deterring voluntary cooperation with the criminal justice system and making the victims of crime also victims of that system.[6]

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[4] *Sandstrom* itself illustrates this fact. There, the Court held that a jury may not be given an instruction stating a principle known to the criminal law since the days of Coke and Blackstone and given in untold numbers of state and federal criminal trials. See pages 16-17, *infra*.

[5] See, *e.g.*, *Luce* v. *United States*, No. 83-912 (Dec. 10, 1984), slip op. 4; *McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U.S. 548, 553-555 (1984); *United States* v. *Hasting*, 461 U.S. 499, 508-509 (1983); *Kotteakos* v. *United States*, 328 U.S. 750 (1946); cf. *Flanagan* v. *United States*, 465 U.S. 259, 264-265 (1984); *Morris* v. *Slappy*, 461 U.S. 1, 11, 14-15 (1983); *Engle* v. *Isaac*, 456 U.S. 107, 126-129 (1982).

[6] For instance, a retrial of this case would force Joy Faulk's daughter Mitzi to relive the slaying of her mother, an undeniably traumatic experience.

Retrials also jeopardize the reliability of trial outcomes. Indeed, it is a truism that the passage of time may render a retrial infeasible, or sometimes impossible, because the memories of witnesses may fade, witnesses may decline to testify, they may move or die, and evidence may become lost. The community's moral and psychological interest in the swift administration of justice also suffers, as does society's interest in the incapacitation and rehabilitation of guilty offenders and the deterrence of future ones. If a defendant accused of a serious crime is free on bail, delay in bringing a criminal prosecution to a close prolongs public anxiety over community safety and increases the risk that the accused may commit new crimes while at large. Defendants, both guilty and innocent, also suffer if their trials are postponed in order to accommodate other defendants' retrials, perhaps by impairing their ability to demonstrate their innocence or by disrupting their personal lives, a burden that is particularly onerous for those defendants who are in custody while awaiting trial. Even where a new trial rectifies the error that occurred in the first one, there is always the risk that new and different errors will take their place. Finally, these costs are enhanced when a conviction is set aside on collateral attack, rather than on direct appeal.[7] These factors make an unnecessary second trial, even if free of error, wholly undesirable.

Of course, if the defendant has fallen victim to an error that created a material risk of a faulty verdict against him, the conviction cannot be allowed to stand. But because new trials are costly in so many ways, the Court has repeatedly held that a defendant is entitled to a fair trial, but not a perfect one, and that the reversal of a

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[7] See, *e.g.*, *United States* v. *Frady*, 456 U.S. 152, 164-166 (1982); *Engle* v. *Isaac*, 456 U.S. at 126-129 & nn. 31-34; *Sumner* v. *Mata*, 449 U.S. 539, 550 & n.3 (1981); *United States* v. *Addonizio*, 442 U.S. 178, 184-185 & n.11 (1979); *Stone* v. *Powell*, 428 U.S. 465, 491 n.31 (1976); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 146-150 (1970).

conviction bestows an unjustified windfall on a defendant where there is no realistic likelihood that the error skewed the factfinding process at trial or rendered the proceedings fundamentally unfair. See, *e.g.*, *United States* v. *Young*, No. 83-469 (Feb. 20, 1985), slip op. 15 & n.14; *Rushen* v. *Spain*, 464 U.S. 114, 118 (1983); *United States* v. *Hasting*, 461 U.S. 499, 509 (1983); *Hamling* v. *United States*, 418 U.S. 87, 134-135 (1974). In fact, the Court has made clear that "it is the *duty* of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless" (*Hasting*, 461 U.S. at 509 (emphasis added)). It is also firmly settled law that even constitutional errors must be disregarded if satisfactorily shown to be harmless. See *Chapman* v. *California*, 386 U.S. 18 (1967).[8] By requiring an appellate court to disregard errors that did not materially affect the outcome of the trial, the harmless error doctrine serves obvious and salutary interests in the administration of criminal justice.[9] At bottom, by recognizing that

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[8] See also, *e.g.*, *Rushen* v. *Spain*, *supra* (right to be present at trial); *United States* v. *Hasting*, *supra* (improper comment on defendant's silence at trial, in violation of the Fifth Amendment Self-Incrimination Clause); *Hopper* v. *Evans*, 456 U.S. 605, 613-614 (1982) (statute improperly forbidding court from giving a jury instruction on a lesser included offense in a capital case, in violation of the Fourteenth Amendment Due Process Clause); *Moore* v. *Illinois*, 434 U.S. 220, 232 (1977) (admission of identification in violation of the Sixth Amendment Counsel Clause); *Brown* v. *United States*, 411 U.S. 223, 231-232 (1973) (admission of out-of-court statement in violation of the Sixth Amendment Confrontation Clause); *Milton* v. *Wainwright*, 407 U.S. 371 (1972) (admission of confession in violation of the Sixth Amendment Counsel Clause); *Chambers* v. *Maroney*, 399 U.S. 42, 52-53 (1970) (admission of evidence obtained in violation of Fourth Amendment); *Coleman* v. *Alabama*, 399 U.S. 1 (1970) (denial of right to counsel at a preliminary hearing in violation of the Sixth Amendment Counsel Clause).

[9] By focusing attention on the underlying fairness of the trial, rather than on immaterial technicalities, it reinforces the principle that the basic purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence (see *United*

"justice, though due to the accused, is due to the accuser also," the harmless error doctrine allows an appellate court "to keep the balance true" (*Snyder* v. *Massachusetts*, 291 U.S. 97, 122 (1934)) between society's interest in convicting the guilty and the defendant's interest in avoiding an unjust conviction. See *Hasting*, 461 U.S. at 509.

2. Given the salutary purposes served by the harmless error doctrine and the modern day proliferation of constitutional rules governing criminal procedure, it is hardly surprising that the Court has found that most constitutional errors can be harmless. *Hasting*, 461 U.S. at 509. At the same time, however, the Court has also recognized that there is a small class of constitutional errors that are so intrinsically inconsistent with the rudiments of due process or inherently prejudicial that reversal of a defendant's conviction is necessary whenever such infractions occur. See *Chapman*, 386 U.S. at 23 n.8. The nature of each of these errors is defined in a

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States v. *Nobles*, 422 U.S. 225, 230 (1975)), and not simply to provide the factual basis for an appellate exposition of abstract legal principles that do not affect the disposition of the case at hand (cf. *Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977)). By removing incentives for defense counsel to plant technical errors in the record for the sole purpose of obtaining a reversal on appeal, the harmless error doctrine not only eliminates matters that are immaterial to the underlying fairness of the trial, but also fosters the public respect for the legal process that is essential if self-help is to be avoided, by proving that the victims of crime can rely upon the criminal process to vindicate their injuries. See *Hasting*, 461 U.S. at 507, 509; *Gregg* v. *Georgia*, 428 U.S. 153, 183 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); *Kotteakos* v. *United States*, 328 U.S. 750, 759-760 (1946); R. Traynor, *The Riddle of Harmless Error* 14, 50 (1970); cf. *Morris* v. *Slappy*, 461 U.S. at 14-15. By contributing to finality, the harmless error doctrine protects society's interests in retribution, incapacitation, deterrence, and rehabilitation. Cf. *Engle* v. *Isaac*, 456 U.S. at 127 & n.32; *Sanders* v. *United States*, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting). Finally, by eliminating burdensome and needless retrials, it conserves scarce resources and averts the risk that a retrial may cause new errors. See *Hasting*, 461 U.S. at 509.

way that makes it unacceptable, meaningless, or impractical to apply the harmless error doctrine to them.

The first and most obvious category of such errors are those that effectively deprive the defendant of what could meaningfully be considered a trial at all. The existence of that category follows from the basic due process principle that the government may not punish a person "prior to an adjudication of guilt in accordance with due process of law" (*Bell* v. *Wolfish*, 441 U.S. 520, 535 (1979) (footnote omitted)). *Chapman* identified two such errors: forcing a defendant to stand trial before a trier of fact with a financial interest in the outcome (see *Tumey* v. *Ohio*, 273 U.S. 510 (1927)) and denying a defendant the assistance of counsel at trial (see *Gideon* v. *Wainwright*, 372 U.S. 335 (1963)). Cf. *Drope* v. *Missouri*, 420 U.S. 162 (1975) (compelling a mentally-incompetent defendant to stand trial); *Moore* v. *Dempsey*, 261 U.S. 86, 89 (1923) (mob dominated trial). Since the two essential components of the modern concept of a fair trial are a neutral and unbiased decisionmaker and the assistance of an attorney, these errors effectively deny a defendant any realistic opportunity for a fair trial as we know it. See *United States* v. *Cronic*, No. 82-660 (May 14, 1984), slip op. 4-11; *Engle* v. *Isaac*, 456 U.S. 107, 134 (1982); *United States* v. *Ash*, 413 U.S. 300, 307-308 (1973). Accordingly, errors such as these, by definition, cannot be excused on the ground that the defendant received a fair trial despite the error. A similar analysis would suggest that depriving a defendant of a jury trial when he is entitled to one could never be harmless even if the bench trial he received was otherwise fair and reliable.

Another type of nonharmless error is one that is both likely by its nature to be damaging, yet at the same time of such a character that reliable measurement of the actual damage in any given case is almost always impos-

sible or highly impractical.[10] Few cases indeed fit into this category. *Holloway* v. *Arkansas*, 435 U.S. 475 (1978), is one example; there, the Court ruled that defense counsel's timely objection to compulsory representation of co-defendants with conflicting interests was presumptively prejudicial. This type of error, *Holloway* explained, necessarily undermines an appellate court's confidence in the accuracy of the verdict because the error is likely to affect the outcome in every case in a manner that is not susceptible to effective appellate review. See 435 U.S. at 490-491.

A third category of errors inherently fatal to a conviction consists of those claims as to which prejudice is itself already an element in establishing the occurrence of a constitutional violation. See, *e.g.*, *United States* v. *Bagley*, No. 84-48 (July 2, 1985), slip op. 10-15 (*Brady* claims); *Strickland* v. *Washington*, No. 82-1554 (May 14, 1984), slip op. 21-26 (ineffective assistance of counsel); *United States* v. *MacDonald*, 435 U.S. 850, 858 (1978) (speedy trial claims);[11] cf. *United States* v. *Young*, slip op. 15 n.14 (plain error under Fed. R. Crim. P. 52(b)). Claims such as these are not subject to a harmless error analysis because it is pointless to inquire whether an

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[10] In Justice Harlan's words, "particular types of error have an effect which is so devastating or inherently indeterminate that as a matter of law they cannot reasonably be found harmless." *Chapman*, 386 U.S. at 52 n.7 (dissenting). *Chapman* noted that the receipt of a coerced confession fits into this category (see *Payne* v. *Arkansas*, 356 U.S. 560 (1958)). However, the Court's later decisions in *Harrington* v. *California*, 395 U.S. 250 (1969), and *Milton* v. *Wainwright*, *supra*, have called into question whether the admission of a coerced confession fits into this class of errors.

[11] A showing of prejudice is not an absolute prerequisite to establishing a speedy trial violation. See *Moore* v. *Arizona*, 414 U.S. 25 (1973); *Barker* v. *Wingo*, 407 U.S. 514, 530-533 (1972). But consideration of prejudice nonetheless plays a major role in assessing such a claim. See *MacDonald*, 435 U.S. at 858. For that reason, this too is a category of cases in which it is fair to say that the harmless error principle has in effect been folded into the decision whether there was an error at all.

error affected the outcome of the trial if the defendant has already shown that the error was prejudicial in proving its existence.[12]

B. Errors Of The Kind That Occurred In This Case Have None Of The Attributes That Support Automatic Reversal

In *Connecticut* v. *Johnson*, 460 U.S. 73 (1983), a plurality of the Court suggested that an instruction stating a conclusive presumption with respect to an unconceded element of the offense cannot be harmless because it amounts to a prohibited directed verdict of guilty. 460 U.S. at 84-87.[13] *Sandstrom*, 442 U.S. at 517-519, and *Francis* v. *Franklin*, No. 83-1590 (Apr. 29, 1985), slip op. 5-17, did not decide whether instructions containing a conclusive or a rebuttable presumption could be harmless, but both cases held that such instructions are invalid because they can either lessen the government's burden of proof or unconstitutionally shift the burden of proof to the accused. In addition, *Francis* found that the rebuttable presumption employed in that case—that the accused was presumed to have killed with malice—was not harmless because it " 'completely eliminated' " his defense that the killing was accidental. Slip op. 18 (citation omitted). While those points explain the flaws that make an instruc-

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[12] In his dissent in *Chapman*, Justice Harlan suggested a fourth category that would include certain types of official misconduct that might warrant reversal in every case to demonstrate society's intolerance for intentional misbehavior. 386 U.S. at 52 n.7. However, *Hasting* clearly rejected any such theory, holding instead that "the interests preserved by the doctrine of harmless error cannot be so lightly and casually ignored in order to chastise * * * prosecutorial overreaching." 461 U.S. at 507; cf. *Mabry* v. *Johnson*, No. 83-328 (June 11, 1984), slip op. 6; *Smith* v. *Phillips*, 455 U.S. 209, 219 (1982).

[13] The plurality left open a possible exception for cases in which the defendant essentially concedes the issue in dispute, as where a defendant concedes the issue of intent by raising an alibi or insanity defense. 460 U.S. at 87.

tion of the kind given here constitutionally unacceptable—and perhaps demonstrate that such an error is likely often to be prejudicial—they do not establish a valid basis for classifying *Sandstrom* errors as inherently prejudicial.

1. *An Instruction Containing An Impermissible Presumption Is Not Invariably The Functional Equivalent Of A Directed Verdict Of Guilty*

If a trial court directs the jury to return a verdict of guilty, the error in doing so is in every case the functional equivalent of the outright denial of a jury trial. In such a case, concededly, reversal could not be avoided by showing that the trial was in all other respects fair and the judge's verdict fully reliable. The court's action would so far have deprived the defendant of an indispensable element of a trial that the outcome could not be allowed to stand. But this observation does not mean that, because a vice of a *Sandstrom* instruction is its tendency to preempt the jury's full consideration of an element of the offense, it is always and necessarily to be equated with an actual directed verdict. Whether that is an apt equation depends instead on the circumstances of the individual case: sometimes the likely impact will be grave enough that it is reasonable to say that the defendant's right to have his guilt determined by the jury has been defeated, but sometimes that will not be so. The situation is analogous to an infringement of the right to counsel: a total deprivation, like a directed verdict, always requires reversal; a partial deprivation, in the form of ineffective assistance, may or may not call for a new trial, depending on the reviewing court's assessment of its likely impact on the outcome of the trial.

This case illustrates our proposition. It is clear that the state trial judge did not enter a directed verdict of guilty in the true sense of that term. The judge expressly told the jury that it was to choose one of six separate verdicts for each of the two killings, including a verdict of not guilty (J.A. 181-182, 184; 8 Tr. 1075-7076, 1083-

1084). Accordingly, respondent was not deprived of his right to a jury trial unless the trial court's instructions effectively foreclosed the jury from finding in his favor on any of the charged offenses.

Properly viewed, the jury instructions on malice given here were not tantamount to a directed verdict even on that element of murder, let alone any of the other elements. The jury was not directed to find that respondent had acted with malice, or that the State had proven that respondent had acted with malice, or that malice was not an issue for their consideration. Nor did the instructions convey that impression to the jury; on the contrary, the trial court repeatedly told the jury that the State had to prove every element of the charged offenses beyond a reasonable doubt.[14] While the jury was told that malice was to be "presumed" (J.A. 185, 187-188; 8 Tr. 1087-1088), the jury was never instructed that this presumption was "conclusive"; on the contrary, the jury was instructed that the presumption "may be rebutted" (J.A. 185, 187; 8 Tr. 1084-1085, 1087-1088). "Given the common definition of [rebut]" (*Sandstrom*, 442 U.S. at 517) as "to drive or beat back[,] * * * to contradict or oppose by formal legal argument, plea, or countervailing proof[,] * * * to expose the falsity of[,] * * * [or] to make or furnish an answer or counter proof" (*Webster's New Collegiate Dictionary* 956 (1981)), no reasonable juror would naturally have construed the instructions on malice as conclusive. And neither the district court, the court of appeals, nor respondent has identified anything else at trial that would have led the jury to adopt that conclusion. Accordingly, because "[a] mandatory rebuttable presumption does not remove the presumed element from the case" (*Francis*, slip op. 9), the instructions on malice given here cannot be deemed to be the equivalent of a directed verdict on this element of the offense.

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[14] J.A. 182, 183 (twice); *id.* at 184, 186 (thrice); *id.* at 187, 188, 189, 190 (thrice); *id.* at 195; 8 Tr. 1076, 1078, 1081, 1084, 1086 (twice); *id.* at 1088-1089, 1090-1091, 1095-1096, 1097, 1098, 1099, 1100-1101; see *id.* at 1091-1092, 1094-1095.

The plurality in *Connecticut* v. *Johnson* appears to suggest (460 U.S. at 85-86) that, because the vice of an improper presumption is that it may have caused the jury to find the presumed fact without actually weighing the evidence, it is illegimate for a reviewing court to determine the effect of the instruction on the jury's findings regarding the factual elements of the offense. But we fail to see a qualitative difference between this and other kinds of trial errors that are subject to a harmless error analysis. Leaving aside exclusionary rules, what makes a ruling an "error" is its potential to distort the jury's consideration of the facts and its application of the law to those facts. Unless the distortion produced by the error transforms the proceedings into something wholly inadequate and effectively eliminates the jury's role as fact-finder, a reviewing court can and should ask whether the error may with sufficient confidence be found not to have affected the verdict in the circumstances of the case before it.[15]

History also strongly militates against the conclusion that an improper presumption denies a defendant the essence of a trial. The instructions on malice given in this case stated principles of the law of homicide that had their roots in the common law as expounded by Coke and Blackstone (R. Perkins & R. Boyce, *Criminal Law* 75-78 (3d ed. 1982)) and that had been given in criminal trials in state and federal courts countless times prior to the decision in *Sandstrom*. This Court itself had noted that "at common law, men are presumed to intend the nat-

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[15] True, it is never certain that the jury would not, in the absence of the offending instruction, have reached an irrational verdict. But a reviewing court is not generally obliged to defer to such a possibility. The Court made this precise point in *Strickland* v. *Washington*, *supra*, explaining that "[a]n assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like," since "[a] defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed." Slip op. 24.

ural consequences of their act and cannot escape punishment for taking life on the claim that they had not intended or expected that such consequence would result from what they purposely did." *Pico* v. *United States*, 228 U.S. 225, 231 (1913). In fact, the Court had upheld a jury instruction voicing, as the Court put it, "nothing more than a statement of the familiar proposition that every man is presumed to intend the natural and probable consequences of his own act." *Allen* v. *United States*, 164 U.S. 492, 496 (1896). It is quite dubious that jury instructions with this pedigree are so invariably prejudicial and so offensive to due process principles that they rendered literally thousands of trials over more than two centuries of Anglo-American common law a virtual nullity.[16]

2. *Jury Instructions Like Those Given Here Are Not So Likely To Be Prejudicial That A Harmless Error Inquiry Is Futile*

The problems caused by improper presumptions are twofold: they may have induced the jury to rely upon the presumption rather than the evidence in finding that respondent was guilty, or they may have led the jury to believe that respondent had the burden of disproving malice. *Francis*, slip op. 9-11. The issue then is whether the verdict can be upheld given the uncertainty created by these instructions. *Id.* at 14-15 n.8. Of course, every error that occurs at trial raises some conceivable doubt whether it influenced the jury, but the harmless

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[16] Cf. *Patterson* v. *New York*, 432 U.S. 197, 202 (1977) (upholding state law placing burden of persuasion on accused on affirmative defenses; "[t]his was the rule when the Fifth Amendment was adopted, and it was the American rule when the Fourteenth Amendment was ratified"); *Barnes* v. *United States*, 412 U.S. 837, 843 (1973) (instruction that the jury may infer guilty knowledge from the unexplained possession of stolen goods states "a traditional common-law inference deeply rooted in our law").

error doctrine requires a court to disregard those errors that it can say with sufficient confidence did not materially contribute to the verdict. Whether that doctrine can apply in a given case will turn upon the likelihood that an error affected the verdict and the degree of uncertainty that the criminal justice system is willing to accept. The category of errors is small in which that inquiry is altogether foreclosed because they are invariably prejudicial or their impact is impossible to assess. See *United States* v. *Cronic*, slip op. 10-13.

Francis suggested, but did not hold, that the inherent uncertainty stemming from an unconstitutional presumption might be too great for the criminal justice system to accept. Slip op. 14-15 n.8, citing *Stromberg* v. *California*, 283 U.S. 359 (1931). *Stromberg* held that an instruction allowing the jury to convict the accused for engaging in activities that were protected by the First Amendment was unconstitutional, notwithstanding the possibility that the jury could have rested its verdict upon an alternative and constitutionally unobjectionable basis. See 283 U.S. at 367-370. There are, of course, no First Amendment principles implicated by this case, and the need to avoid punishing protected speech is thus wholly absent here. Instead, the question is whether the possibility that the jury may have relied upon an unlawful presumption is too great for the criminal justice system to accept, regardless of the sufficiency of the proof of the defendant's guilt, the nature and sufficiency of the defenses that he asserted at trial, and the factual findings underlying the jury's verdict.

In contrast to the suggestion in the *Francis* footnote stands the holding in *United States* v. *Frady*, 456 U.S. 152 (1982), which makes clear that this question cannot be given a categorical answer and must be resolved by looking to the facts of each case. In *Frady*, the defendant contended that he was denied a fair trial by the use of jury instructions on malice that were not materially different from those given here. See 456 U.S. at 158 & n.7. Because the defendant did not object to the instructions

at his trial, the Court held that he was required to prove, inter alia, that he had been prejudiced by their use in his case. In so ruling, the Court expressly rejected his claim that "an error in the instructions concerning an element of the crime charged amounts to prejudice *per se*, regardless of the particular circumstances of the individual case" (*id.* at 170). Instead, the Court held that a defendant must "shoulder the burden of showing, not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimension." *Ibid.* (emphasis in original). Finding that the proof of malice was overwhelming and had not been controverted by the defendant's alibi defense, the Court held that he had not been prejudiced by the instructions, a conclusion also supported by the jury's finding that the murder was premeditated and deliberate. *Id.* at 171-174. *Frady* therefore forecloses the conclusion that erroneous instructions on malice are not subject to a harmless error analysis.[17]

Frady does not stand alone. The Court has found that a variety of different errors of similar dimension in jury instructions do not automatically require the judgment to be set aside. See *Zant* v. *Stephens*, 462 U.S. 862 (1983) (jury instruction based on unconstitutionally vague aggravating factor at a capital sentencing hearing does not invariably require reversal); *Kentucky* v. *Whorton*, 441 U.S. 786 (1979) (failure to give a jury instruction on the presumption of innocence does not invariably require reversal); *Henderson* v. *Kibbe*, 431 U.S. 145 (1977) (failure to instruct jury on causation is not always prejudicial); *Anderson* v. *United States*, 417 U.S. 211, 227-228

[17] To be sure, in *Frady* the defendant was required to carry the burden of showing prejudice on account of his procedural default, whereas the question here is whether the prosecution is to be permitted to take up the burden of showing the absence of prejudice beyond a reasonable doubt. The pertinent point about *Frady*, of course, is not the burden of persuasion but the Court's recognition of the feasibility of the inquiry.

(1974) (failure to instruct on an essential element of the offense is not plain error where the verdict shows that the jury would have found that element of the offense had it been properly charged); cf. *Barclay* v. *Florida*, 463 U.S. 939 (1983) (sentencing judge's reliance upon an aggravating factor that is invalid under state law does not require capital sentence to be vacated).[18]

The experience of the lower courts reinforces this Court's ruling in *Frady* that an erroneous jury instruction on malice will not so frequently affect the outcome of a trial that a case-by-case determination of the actual effect that the charge may have had is unwarranted. The nearly unanimous opinion of the federal courts of appeals is that this question can generally be addressed without

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[18] Other decisions by the Court (in cases that did not present this issue) have also involved factual situations in which it could be said with complete assurance that no reasonable juror could have failed to conclude that the defendant acted with malice. For example, could there be any doubt that Timothy McCorquodale, whose crimes were twice described by this Court as a "horrifying torture-murder" (*Gregg* v. *Georgia*, 428 U.S. at 201 (footnote omitted) (opinion of Stewart, Powell, and Stevens, JJ.); *Godfrey* v. *Georgia*, 446 U.S. 420, 429-430 (1980) (plurality opinion)), acted with malice aforethought? (In fact, the Eleventh Circuit found that jury instructions like those given here were harmless in McCorquodale's case: *McCorquodale* v. *Balkcom*, 705 F.2d 1553, 1555-1556, adopted in pertinent part, 721 F.2d 1493, 1502 (11th Cir. 1983) (en banc), cert. denied, 466 U.S. 954 (1984)). See also *Baldwin* v. *Alabama*, No. 84-5743 (June 17, 1985), slip op. 2 (over a 40-hour period, victim was brutalized, choked, repeatedly stabbed, run over by a car, and had her throat cut with a hatchet); *Wainwright* v. *Goode*, 464 U.S. 78, 79-80 (1983) (defendant strangled ten-year old boy with a belt; at trial, defendant "testified in graphic detail as to the circumstances of the killing" and stated that "he was 'extremely proud' of having murdered [the victim] 'for the fun of it'"); *Hopper* v. *Evans*, 456 U.S. 605, 606-607, 612-613 (1982). Tennessee has also had its share of such homicides. See, *e.g.*, *Tennessee* v. *Street*, No. 83-2143 (May 13, 1985), slip op. 1-2 (robbery victim hanged); *State* v. *Matson*, 666 S.W.2d 41 (Tenn. 1984) (victim murdered to prevent him from identifying defendant).

undue difficulty. The First, Second, Fourth, Fifth, Sixth, Ninth, Eleventh, and District of Columbia Circuits have held that jury instructions of this type can be harmless where the evidence conclusively proves the issue in dispute and the defense raised by the accused does not contest that issue, or where other findings by the jury eliminate any uncertainty that the jury would have found the element in dispute. Although the Eighth Circuit has held that an instruction of this type ordinarily is presumptively prejudicial, even that court would be likely to find that the instructions in this case were harmless, since the jury's first degree murder verdict eliminates any uncertainty caused by the instructions on malice.[19] See pages 23-24, *infra*. Most state courts to consider the question have also found that these instructions can be harmless. The lower court cases are collected in an appendix to this brief.

C. Respondent Was Not Prejudiced By The Instructions On Malice That Were Given In His Case

The remaining inquiry is whether respondent was actually prejudiced by the trial court's instructions on malice in his case. The principles governing review of a claim that jury instructions denied the accused a fair trial are well settled. First, "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973); see also *Francis*, slip op. 11; *Whorton*, 441 U.S. at 788-789; *Kibbe*, 431 U.S. at 153-156; *United States* v. *Park*, 421 U.S. 658, 674-676 (1975). Moreover, because "the process of instruction itself is but one of several components of the trial which may result in [a] judgment of conviction" (*Cupp*, 414

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[19] See *Redding* v. *Benson*, 739 F.2d 1360, 1363-1365 (8th Cir. 1984), cert. denied, No. 84-5908 (Feb. 19, 1985) (failure to instruct the jury on essential element of the offense is harmless where the jury necessarily found that element nonetheless because of other instructions).

U.S. at 147), even on direct appeal a court must "view the [jury] charge itself as part of the whole trial" (*Park*, 421 U.S. at 674). The issue in a collateral proceeding, such as this one, is " 'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process,' * * * not merely whether 'the instruction is undesirable, erroneous, or even "universally condemned."' " *Kibbe*, 431 U.S. at 154 (citation omitted); *Cupp*, 414 U.S. at 146-147. When the record of respondent's trial is realistically appraised, there can be no serious doubt that he was not substantially prejudiced by the instructions on malice.

1. An appropriate starting point is to compare the jury instructions given at respondent's trial with others on the same subject that would have been unobjectionable. Cf. *Zant*, 462 U.S. at 888; *Kibbe*, 431 U.S. at 154-157. For example, the trial court could have told the jury that (1) it may consider that the killings had been accomplished by the use of a deadly weapon in deciding whether the State had proved malice, and (2) it may consider all of the surrounding circumstances in determining whether respondent acted with malice. Given the evidence at respondent's trial, it is virtually certain—indeed, the jury's first degree murder verdict makes it absolutely certain—that the jury would have found that he acted with malice even if these jury instructions had been given in lieu of the ones that were actually used.

In this case, the evidence of malice was little short of overwhelming; to borrow a phrase from *Frady*, the evidence at trial showed that there was " 'malice aplenty' " (456 U.S. at 171 (citation omitted)). Two weeks before the night in question, respondent borrowed the murder weapon from a friend, using the ruse that his own revolver had been stolen. On the night of the slayings, respondent followed Faulk and Browning to a remote location at which, by deftly positioning his own car, he prevented their escape. At that point, and in full view of Faulk's two children, respondent shot Faulk and Browning in the head at point-blank range. Indeed, it is

fair to say that the State's proof in this case was, as in *Frady*, virtually conclusive on this issue. Compare pages 1-2, *supra*, with 456 U.S. at 171-172. Accordingly, even if a misstatement of the law is more likely to be prejudicial than an incomplete statement or an omission (*Kibbe*, 431 U.S. at 155), in this case the likelihood that a properly instructed jury would have found that respondent acted without malice is virtually nil.

For that reason, this case bears no resemblance to *Francis*. There, the defendant, while attempting to escape from custody, knocked on the door of a nearby home and demanded the resident's car keys. As the occupant slammed the door, Franklin's gun discharged, killing the occupant. Franklin's sole defense at trial was that the occupant was killed as the result of an accidental response to the slamming of the door, a defense supported by his treatment of everyone else he came across during his attempted escape. Slip op. 1-3. This Court upheld the court of appeals' finding that an erroneous instruction on malice was not harmless because " '[Franklin's] defense was that he did not have the requisite intent to kill' " and " '[t]he facts did not overwhelmingly preclude that defense' " (*id.* at 17-18 (citation omitted)). The Court also found additional support for that conclusion in the fact that the jury had asked the trial court to be reinstructed on the elements of malice and on Franklin's accident defense. *Id.* at 18. None of those factors is present here.

2. Moreover, the jury found respondent guilty of the first degree murder of Faulk, and neither the district court nor the the court of appeals found any error in the instructions on the additional *mens rea* components constituting that offense. Under the instructions on first degree murder given at respondent's trial, the verdict shows that the jury found that he had acted willfully and with premeditation and deliberation on an intent to kill.[20] Given the evidence of respondent's preparation for

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[20] The trial court instructed the jury as follows: (J.A. 184-185; 8 Tr. 1084-1085): "For you to find the Defendant guilty of murder

the crimes and the manner in which they were carried out, it is inconceivable that the jury that found that he acted willfully and with premediation and deliberation, would, if correctly instructed, have failed to find malice,[21] and neither the district court, the court of appeals, nor respondent has offered any plausible basis for so concluding. See *Frady*, 456 U.S. at 169-174; *United States* v. *Green*, 424 F.2d 912, 913 (D.C. Cir. 1970); *Belton v. United States*, 382 F.2d 150, 155 (D.C. Cir. 1967); cf. *Kibbe*, 431 U.S. at 156 ("the jury's determination that the respondent acted recklessly necessarily included a determination that the ultimate harm was foreseeable to him").

3. Finally, in this case, unlike *Francis*, the trial court's instructions on malice did not completely eliminate any

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in the first degree, the State must have proven beyond a reasonable doubt: [¶] (1) That the Defendant unlawfully killed the alleged victim. [¶] (2) That the killing was malicious: That is, that the Defendant was of the state of mind to do the alleged wrongful act without legal justification or excuse. If it is shown beyond a reasonable doubt that the alleged victims were killed, the killing is presumed to be malicious in the absence of evidence which would rebut the implied * * * presumption. [¶] (3) That the killings were willful: That is, that the Defendant must have intended to take the life of the alleged victim. [¶] (4) That the killing was deliberate: That is, with cool purpose. [¶] (5) That the killing was premeditated. This means that the intent to kill must have been formed prior to the act itself. Such intent or design to kill may be conceived and deliberately formed in an instant. It is not necessary that the purpose to kill preexist in the mind of the accused for any definite period of time. It is sufficient that it preceded the act, however short the interval." These instructions were consistent with Tennessee law on first degree murder. See, *e.g.*, *State* v. *Bullington*, 532 S.W.2d 556, 559 (Tenn. 1976); *Swan* v. *State*, 23 Tenn. (4 Hum.) 136, 139 (1843); *Anthony* v. *State*, 19 Tenn. (1 Meigs) 265, 277 (1838); *Dale* v. *State*, 18 Tenn. (10 Yer.) 551, 551-552 (1837).

[21] Under Tennessee law, multiple gun shot wounds to the victim is a sufficient basis for the jury to find that the defendant acted with premeditation and deliberation. See, *e.g.*, *Houston* v. *State*, 593 S.W.2d 267, 273 (Tenn. 1980); *State* v. *Story*, 608 S.W.2d 599, 601 (Tenn. Crim. App. 1980).

of respondent's chosen defenses; on the contrary, the instructions on malice aforethought were simply irrelevant to the defenses that respondent raised at trial.

Respondent's primary defense was that Faulk's ex-husband, not he, had committed the crimes. In that respect, this case is not materially different from *Frady*, in which the Court held that the defendant was not prejudiced by similar instructions because his defense was that he had not been involved in the murder. 456 U.S. at 169-174. And although the evidence showing that respondent had committed the murders, aside from the testimony of Faulk's daughter, was largely circumstantial, the evidence plainly showed that whoever was responsible for the slayings acted with malice. Accordingly, since the evidence on this issue was overwhelming and was not controverted by respondent's defense that someone else did the killing, there is no realistic possibility that the instructions on malice could have prejudiced his alibi defense. See *Frady*, 456 U.S. at 169-174; *Martin* v. *Foltz*, 773 F.2d 711, 719 (6th Cir. 1985); *Tucker* v. *Kemp*, 762 F.2d 1496, 1501-1503 (11th Cir. 1985) (en banc); *McCleskey* v. *Kemp*, 753 F.2d 877, 903-904 (11th Cir. 1985) (en banc), petition for cert. pending, No. 85-6811; *Charles* v. *Foltz*, 741 F.2d 834, 839 (6th Cir. 1984); *Garland* v. *Maggio*, 717 F.2d 199, 203-204 (5th Cir. 1983); *McGuinn* v. *Crist*, 657 F.2d 1107, 1108-1109 (9th Cir. 1981), cert. denied, 455 U.S. 990 (1982); see also *Johnson*, 460 U.S. at 87 (plurality opinion). Beyond that, respondent did not object at trial to the instructions on malice (Pet. App. A10 n.6), which adds support to the conclusion that these instructions were not perceived as likely to prejudice his defense. See *Wainwright* v. *Witt*, No. 83-1427 (Jan. 21, 1985), slip op. 18 & n.11; *id.* at 2-3 (Stevens, J., concurring); *Engle* v. *Isaac*, 456 U.S. at 136 n.1 (Stevens, J., concurring in part and dissenting in part).[22]

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[22] Respondent's alibi defense was itself quite weak. Respondent did not testify; nor did any defense witness pinpoint his where-

Somewhat inconsistently, respondent also claimed that he was insane at the time of the murders and thus should not be held responsible for those crimes. But the jury was expressly instructed not to consider respondent's insanity claim unless and until it found that he had committed the crimes charged against him (8 Tr. 1091-1092). This instruction is consistent with Tennessee [23] (and federal [24]) law, under which a defendant's "diminished

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abouts at the relevant time. One defense psychiatrist testified that respondent offered only "vague" and "confusing" answers as to where he was that night (J.A. 100, 101; 6 Tr. 819, 843), while the other defense psychiatrist testified that he could not remember exactly what respondent had told him (J.A. 134; 7 Tr. 877). By contrast, several eyewitnesses testified for the State that Sam Faulk, who respondent claimed had committed the murders, had spent the entire evening at a local bar. See pages 2-3 note 1, *supra*.

[23] See *Graham* v. *State*, 547 S.W.2d 531 (Tenn. 1977) (insanity is a legal excuse for a crime). The Tennessee Supreme Court's decision in *Graham* adopted the ALI Model Penal Code test for insanity and also approved (547 S.W.2d at 543) questions for the jury on this issue that were adopted in *United States* v. *Smith*, 404 F.2d 720, 727 (6th Cir. 1968). Those questions are limited to the issue whether the defendant was sane at the time of the charged offense; they do not instruct the jury to consider evidence of a defendant's mental disease when determining whether he is guilty of the crimes charged against him. 404 F.2d at 727. The state courts' rulings in this case confirm this point. At trial, respondent proposed several jury instructions presenting a diminished capacity defense, all of which were rejected by the trial court. See R. 107, 110, 111-112, 116; 8 Tr. 1104. On appeal, respondent argued that the trial court's refusal to give these instructions was erroneous (see Assignments of Error, Brief and Argument on Behalf of Stanley Barnham Clark at 74-77, *State* v. *Clark*, No. 8149 (Tenn. Crim. App. filed May 16, 1980)), and the Tennessee Court of Criminal Appeals rejected his argument (see Pet. App. A36). It is thus clear that Tennessee does not have a diminished capacity defense to murder.

[24] Congress has rejected the diminished capacity defense for federal criminal prosecutions. See the Comprehensive Crime Control Act of 1984 (Insanity Defense Reform Act of 1984), Pub. L. No. 98-473, § 402, 98 Stat. 2057 (to be codified at 18 U.S.C. 20) (mental

capacity," as that defense is known, is not a defense to a crime unless it amounts to insanity. The malice charge therefore could not have affected respondent's insanity defense. See *Bowen* v. *Kemp*, 769 F.2d 672, 676-678 (11th Cir. 1985); see also *Johnson*, 460 U.S. at 87 (plurality opinion).

Nor did the instructions on malice prejudice any of the remaining defenses respondent asserted at trial. For instance, respondent also presented evidence to the effect that he was suffering from amnesia at the time of the trial. However, the jury was told that amnesia, by itself, was not a defense to any of the charges against respondent (J.A. 195; 8 Tr. 1098).[25] The instructions on malice were therefore irrelevant to this alleged defense. Respondent also claimed that he was voluntarily intoxicated at the time of the crimes and thus could not have possessed the *mens rea* necessary for murder. However, voluntary intoxication, while a defense to first degree murder, was no defense to second degree murder (J.A.

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disease does not constitute a defense unless it satisfies the test for insanity); S. Rep. 98-225, 98th Cong., 1st Sess. 229 (1983).

[25] See *Thomas* v. *State*, 201 Tenn. 645, 652-653, 301 S.W.2d 358, 361 (1957) (amnesia without more does not establish insanity); *Lester* v. *State*, 212 Tenn. 338, 344-348, 370 S.W.2d 405, 408-409 (1963) (same); *Burton* v. *State*, 217 Tenn. 62, 66-68, 394 S.W.2d 873, 875 (1965) (same); *Sparkman* v. *State*, 469 S.W.2d 692, 696-697 (Tenn. Crim. App. 1970). As the Tennessee Court of Criminal Appeals summarized in *Sparkman*, "[i]nsanity and amnesia are distinct conditions, even though amnesia sometimes is an incident of insanity. Insanity is incapacity to discriminate between right and wrong, while amnesia is simply the inability to remember. * * * Amnesia alone is no defense to a criminal charge, unless it is shown by competent evidence that the accused did not know the nature and quality of his action and that it was wrong." 469 S.W.2d at 696-697. The district court's ruling that amnesia is a defense under Tennessee law (Pet. App. A20) is clearly in error and should not be given any weight by this Court (see *Brockett* v. *Spokane Arcades, Inc.*, No. 84-28 (June 19, 1985), slip op. 8 & n.9).

193-195; 8 Tr. 1097-1098).[26] The instructions on malice therefore could have had no effect on this alleged defense either. Additionally, because respondent plainly did not succumb to amnesia or become intoxicated between the times that he shot Faulk and Browning, the jury's finding that he acted willfully and with premeditation and deliberation when he murdered Faulk clearly demonstrates that the jury found that respondent's claim of voluntary intoxication was insufficient to raise a reasonable doubt of his guilt of that crime.[27]

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[26] See *Pirtle* v. *State*, 28 Tenn. (9 Hum.) 663, 664-673 (1849) (voluntary intoxication may be a defense to first degree murder, by negating premeditation and deliberation, but is not a defense to second degree murder); *Haile* v. *State*, 30 Tenn. (11 Hum.) 154, 155-158 (1850) (same); *Lancaster* v. *State*, 70 Tenn. 575, 577-578 (1879) (same); *Cartwright* v. *State*, 76 Tenn. 376, 380-386 (1881) (same); *Thomas* v. *State*, 201 Tenn. at 647-651, 301 S.W.2d at 359-360 (same); *State* v. *Bullington*, 532 S.W.2d 556, 560 (Tenn. 1976) (same); *State* v. *Adkins*, 653 S.W.2d 708 (Tenn. 1983) (same); *State* v. *Plummer*, 658 S.W.2d 141, 143 (Tenn. Crim. App. 1983) (same); see also W. LaFave & A. Scott, *Criminal Law* § 45, at 345 (1972). The district court misconstrued state law in concluding that voluntary intoxication is a defense to a charge of second degree murder (Pet. App. A20).

[27] What is more, respondent's proof of amnesia and voluntary intoxication was less than overwhelming. Respondent's amnesia appears to have been quite selective: it was limited to the period immediately surrounding the time of the killings (J.A. 96-103, 116-117, 134; 6 Tr. 812-823, 843; 7 Tr. 877). Respondent's voluntary intoxication claim was based upon his statement to the defense psychiatrists that he had consumed as much as six six-packs of beer and one pint of vodka on the day in question, which appears to be at odds with his claim that he could generally remember the events of that day and that he could drive an automobile (J.A. 96-101; 6 Tr. 814-819). One defense psychiatrist expressed some doubt whether he believed respondent's claim (J.A. 97; 6 Tr. 814-815), and the State's psychiatrist testified that consumption of that amount of alcohol in one day "approach[ed] the lethal amount of alcohol," would render a person "extremely sick," and, even if not physically impossible, was "very unlikely" (J.A. 160-161; 6 Tr. 943-944).

In sum, it is beyond any reasonable doubt that respondent was not prejudiced by the erroneous instructions on malice. Neither of the two valid defenses asserted by respondent could have been affected by these instructions, and respondent's other claims did not state valid defenses under the instructions given to the jury or under state law. This case is not materially different from *Frady*, where the Court held that the defendant was not prejudiced by similar instructions. It necessarily follows that the lower courts erred by ordering that respondent be retried.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

A. The following courts have held that jury instructions containing a conclusive presumption (*Sandstrom*; *Johnson*), a rebuttable presumption (*Francis*), or a similar type of error, may be harmless in a given case:

First Circuit: *United States* v. *Winter*, 663 F.2d 1120, 1144-1145 (1981), cert. denied, 460 U.S. 1011 (1983) (*Sandstrom* instruction harmless where defense was nonparticipation).

Second Circuit: *Fournier* v. *LeFevre*, 734 F.2d 125, 128-129 (1984) (*Sandstrom* instruction harmless where there was no issue at trial whether the defendant acted intentionally, only what precise intent the defendant had, and the defendant's own testimony established that he had either requisite intent); *Mancuso* v. *Harris*, 677 F.2d 206, 210-211 (1982) (*Sandstrom* instruction harmless in light of other instructions, felony-murder theory of liability, and defense of nonparticipation); *Nelson* v. *Scully*, 672 F.2d 266, 271-272, cert. denied, 456 U.S. 1008 (1982) (*Sandstrom* instruction harmless given other instructions); see also *Washington* v. *Harris*, 650 F.2d 447, 453-454 (1981), cert. denied, 455 U.S. 951 (1982) (dictum that *Sandstrom* instructions can be harmless). Compare *Simmons* v. *Dalsheim*, 702 F.2d 423, 424 (1983), aff'g on basis of district court's opinion, 543 F. Supp. 729 (S.D.N.Y. 1982) (jury instruction placing burden of proof on defendant on alibi defense prejudicial); *Ramirez* v. *Jones*, 683 F.2d 712, 715-716 (1982) (error prejudicial where intent to kill in dispute).

Fourth Circuit: *Tweety* v. *Mitchell*, 682 F.2d 461, 465 (1982), cert. denied, 460 U.S. 1013 (1983) (*Sandstrom* instruction harmless where there were "mitigating" instructions and the evidence of intent was overwhelming); see also *Fulton* v. *Warden*, 744 F.2d 1026, 1031-1034 (1984) (jury instruction shifting the burden of proof to

the defense on an alibi defense did not require setting aside the conviction, but applying a more demanding standard than the *Chapman* harmless error standard, because of habeas corpus considerations); *United States* v. *Davis*, 739 F.2d 172, 174-175 (1984) (jury instruction arguably placing burden of proof on defendant on intoxication defense harmless in light of other instructions requiring government to prove specific intent).

Fifth Circuit: *Garland* v. *Maggio*, 717 F.2d 199, 203-204 (1983) (*Sandstrom* instruction harmless where defense was nonparticipation); *Healy* v. *Maggio*, 706 F.2d 698, 701-702 (1983) (*Sandstrom* instruction harmless where proof of intent was overwhelming even though intent was a disputed issue, since defense was accidental homicide); *United States* v. *Fricke*, 684 F.2d 1126, 1129 (1982), cert. denied, 460 U.S. 1011 (1983) (*Sandstrom* instruction harmless where intent was not at issue); see also *United States* v. *Spiegel*, 604 F.2d 961, 968-970 (1979), cert. denied, 446 U.S. 935 (1980) (*Francis* instruction not plain error in that case). Compare *Mason* v. *Balkcom*, 669 F.2d 222, 227 (1982), cert. denied, 460 U.S. 1016 (1983) (*Sandstrom* instruction prejudicial where evidence of guilt was not overwhelming and defense was lack of premeditation and deliberation). But see *Hammontree* v. *Phelps*, 605 F.2d 1371, 1380 (1979) (mandatory, conclusive presumption cannot be harmless).

Sixth Circuit: *Logan* v. *Agshire*, No. 85-1290 (Dec. 9, 1985), slip op. 3-4 (*Sandstrom* instruction harmless where proof of intent overwhelming); *Martin* v. *Foltz*, 773 F.2d 711, 719 (1985) (" 'malice is implied' " jury charge is harmless where the only issue at trial was whether the defendant participated in the crime and there was no question that whoever committed the murder did so with an intent to kill); *Charles* v. *Foltz*, 741 F.2d 834, 839 (1984) (same instruction harmless in similar circumstances); *United States* v. *Crowder*, 719 F.2d 166, 172-173 (1983), cert. denied, 466 U.S. 974 (1984) (error harmless where proof of intent was sufficient even though

intent was a disputed issue); *Conway* v. *Anderson*, 698 F.2d 282, 285-286, cert. denied, 462 U.S. 1121 (1983) (error harmless where proof of intent was overwhelming and intent was not a disputed issue); *Krzeminski* v. *Perini*, 614 F.2d 121, 125, cert. denied, 449 U.S. 866 (1980) (*Sandstrom* instruction harmless where defendant admitted element of offense). Compare *Engle* v. *Koehler*, 707 F.2d 241, 246 (1983), aff'd by an equally divided court, 466 U.S. 1 (1984) (*Sandstrom* instruction prejudicial where intent was a disputed issue at trial); *Phillips* v. *Rose*, 690 F.2d 79, 81-82 (1982) (error prejudicial where evidence supported accident defense); *Burton* v. *Bergman*, 649 F.2d 428, 431-432 (*Sandstrom* instruction prejudicial where evidence of intent in dispute).

Ninth Circuit: *McGuinn* v. *Crist*, 657 F.2d 1107, 1108-1109 (1981), cert. denied, 455 U.S. 990 (1982) (*Sandstrom* instruction harmless where defense was alibi). Compare *In re Hamilton*, 721 F.2d 1189, 1191-1192 (1983) (*Sandstrom* instruction would be prejudicial if intent was a disputed issue at trial; remanding case to district court for further inquiry).

Eleventh Circuit: *Bowen* v. *Kemp*, 769 F.2d 672, 676-678 (1985) (*Sandstrom* instruction harmless where evidence conclusively established intent and defense was insanity); *Tucker* v. *Kemp*, 762 F.2d 1496, 1501-1503 (1985) (en banc) (*Francis* instruction harmless where defense was nonparticipation in the murder and evidence of intent was overwhelming); *McCleskey* v. *Kemp*, 753 F.2d 877, 903-904 (1985) (en banc), petition for cert. pending, No. 84-6811 (*Francis* instruction harmless where proof of intent overwhelming and defense was alibi); *Davis* v. *Kemp*, 752 F.2d 1515, 1521 (1985) (en banc), cert. denied, No. 84-6601 (June 3, 1985) (*Francis* instruction harmless where proof of intent was overwhelming and defense was nonparticipation); *Jarrell* v. *Balkcom*, 735 F.2d 1242, 1257 (1984) (*Francis* instruction harmless where proof of guilt was overwhelming and alibi was "very weak"); *Collins* v. *Francis*, 728 F.2d 1322, 1330-

1331 (1984) (*Sandstrom* instruction harmless where defense was nonparticipation); *id.* at 1351-1352 (Tjoflat, J., concurring specially) (same); *McCorquodale* v. *Balkcom*, 705 F.2d 1553, 1555-1556, adopted in pertinent part, 721 F.2d 1493, 1502 (1983) (en banc), cert. denied, 466 U.S. 954, order staying execution, 467 U.S. 1202 (1984), order vacating stay of execution, No. 83-6350 (Feb. 25, 1985) (*Sandstrom* instruction harmless where defense admitted guilt); *Lamb* v. *Jernigan*, 683 F.2d 1332, 1342-1343 (1982), cert. denied, 460 U.S. 1024 (1983) (*Sandstrom* instruction harmless where proof of guilt was overwhelming). Compare *Corn* v. *Kemp*, 772 F.2d 681, 683 n.2 (1985) (*Francis* instruction prejudicial where intent was a disputed issue); *Carter* v. *Montgomery*, 769 F.2d 1537, 1541-1542 (1985) (*Francis* instruction prejudicial where defense was accidental homicide); *Thomas* v. *Kemp*, 766 F.2d 452, 455-456 (1985) (*Francis* instruction prejudicial where proof of intent not overwhelming and defense was intoxication); *Drake* v. *Kemp*, 762 F.2d 1449, 1453, 1457 (1985), petition for cert. pending, No. 85-556 (*Francis* instruction harmful where one of the alternative bases of liability required proof of intent even though defense was alibi); *Brooks* v. *Kemp*, 762 F.2d 1383, 1390-1394 (1985) (en banc), petition for cert. pending, No. 85-553 (*Francis* instruction prejudicial where defense was accidental homicide); *Patterson* v. *Austin*, 728 F.2d 1389, 1395-1396 (1984) (*Francis* instruction prejudicial where evidence would have supported conviction for lesser offenses of voluntary or involuntary manslaughter, or self-defense).

District of Columbia Circuit: *United States* v. *Martin*, 475 F.2d 943, 946-950 (1973) (instruction placing burden of proof on defendant on intoxication defense is harmless); *United States* v. *Green*, 424 F.2d 912, 913 (1970) (instruction that an intentional act constitutes malice aforethought is not plain error where the jury found that the defendant premeditated and deliberated on an intent to kill); *Belton* v. *United States*, 382 F.2d 150, 154-155

(1967) (instruction that " 'the law infers * * * malice' " was not plain error where the jury found that the defendant premeditated and deliberated on an intent to kill).

The States: *People* v. *Garcia*, 36 Cal. 3d 539, 684 P.2d 826, 205 Cal. Rptr. 265 (1984) (dicta that failure to instruct jury on essential aggravating factor of capital sentence can be harmless where defendant was acquitted on that factor, defendant conceded that factor, or evidence conclusively established that factor; failure to give instruction in that case did not fit into these categories, however); *Wilson* v. *Zant*, 249 Ga. 373, 290 S.E.2d 442, cert. denied, 459 U.S. 1092 (1982) (error harmless where defense was alibi); *People* v. *Frazier*, 123 Ill. App. 3d 563, 573-575, 463 N.E.2d 165, 173-174 (1984) (error harmless where proof overwhelming); *State* v. *Johnson*, 233 Kan. 981, 986, 666 P.2d 706, 711 (1983) (rebuttable presumption not invalid); *State* v. *Boyce*, 471 A.2d 687, 687 (Me. 1984) (conclusive presumption harmless where defendant conceded the issue in his trial testimony); *People* v. *Wright*, 408 Mich. 1, 26-34, 289 N.W.2d 1, 9-12 (1980) (error harmless where substantial proof of defendant's guilt; error prejudicial where proof more tenuous); *People* v. *Dolsen*, 301 N.W.2d 865, 867-868 (Mich. Ct. App. 1980) (error harmless where defense was alibi); *People* v. *McCracken*, 100 Mich. App. 698, 703-706, 300 N.W.2d 376, 379-380 (1980) (error harmless where proof of defendant's guilt is overwhelming); *State* v. *Hamilton*, 605 P.2d 1121, 1131-1133 (Mont.), cert. denied, 447 U.S. 924 (1980) (error harmless given defendant's statements at time of the crime); *State* v. *Sheldon*, 301 N.W.2d 604, 611-613 (N.D. 1980), cert. denied, 450 U.S. 1002 (1981) (conclusive presumption harmless where defendant was convicted of an unrelated offense); *State* v. *Flack*, 58 Or. App. 330, 335-337, 648 P.2d 857, 860-861 (1982) (error harmless where proof overwhelming); *State* v. *Bolin*, 678 S.W.2d 40, 45 (Tenn. 1984) (error harmless where proof

overwhelming); *Saldana* v. *State*, 685 P.2d 20, 23 (Wyo. 1984) (error harmless given other jury instructions); cf. *State* v. *Taylor*, 651 S.W.2d 603, 605-606 (Mo. Ct. App. 1983) (instruction shifting burden of proof to defendant on defense of extreme emotional disturbance harmless where evidence was insufficient to support his defense).

B. The following courts have held that jury instructions containing a conclusive presumption (*Sandstrom*; *Johnson*), a rebuttable presumption (*Francis*), or a similar error, cannot be harmless in any case:

Eighth Circuit: *United States* v. *Ben M. Hogan Co.*, 769 F.2d 1293, 1297-1298 (1985) (conclusive presumption that bid-rigging agreement affected interstate commerce in a Sherman Act prosecution). Compare *Dietz* v. *Solem*, 640 F.2d 126, 131 (1981) (rebuttable presumption not harmless even though chief issue at trial was whether defendant had committed actus reus); *Stump* v. *Bennett*, 398 F.2d 111, 122-123 (en banc), cert. denied, 393 U.S. 1001 (1968) (instruction placing burden of proof on defendant on alibi defense harmful where alibi defense was invoked at trial). But cf. *Redding* v. *Benson*, 739 F.2d 1360, 1363-1365 (1984), cert. denied, No. 84-5908 (Feb. 19, 1985) (failure to instruct the jury on essential element of the offense is harmless where the jury necessarily found that element nonetheless because of other instructions).

The States: *State* v. *Truppi*, 182 Conn. 449, 465-467, 438 A.2d 712, 721 (1980), cert. denied, 451 U.S. 941 (1981) (conclusive presumption cannot be harmless on any charge to which the instruction referred); *State* v. *Johnson*, *supra* (conclusive presumption cannot be harmless); *State* v. *LaForge*, 347 N.W.2d 247, 256 (Minn. 1984) (suggesting that a conclusive presumption cannot be harmless); *Lowry* v. *State*, 671 S.W.2d 601, 603 (Tex. Ct. App. 1984) (suggesting that an instruction shifting the burden of proof to the accused on an element of the

offense cannot be harmless); *State* v. *Martell*, 465 A.2d 1346, 1348 (Vt. 1983) (conclusive presumption cannot be harmless); *State* v. *McCormick*, 277 S.E. 629, 631-632 (W. Va. 1981) (suggesting that a conclusive presumption is always invalid under state law).

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